U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 March 2004

BALCA Case No.: 2003-INA-87
ETA Case No.: P2000-CA-09502207

In the Matter of:

AM HI-TECH LAB, INC.,
Employer,

on behalf of

XIAOBIAO SU,
Alien.

Appearance: Hsiang Jean, Esquire
Cupertino, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by Am Hi-Tech Lab, Inc. ("Employer") on behalf of Xiaobiao Su ("the Alien") for the position of Hardware Engineer, also classified as Electronics Design Engineer. (AF 130). The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

[1] Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

STATEMENT OF THE CASE

On September 6, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Hardware Engineer. (AF 130-131). The duties of the job included designing and developing an automobile controller system, engine fuel control systems, and CPU automatic control systems, as well as performing research and establishing a database. A Masters degree in electrical or mechanical engineering and three years experience in the position were required. (AF 130).

On April 8, 2002, the CO issued a Notice of Findings ("NOF") indicating the intent to deny certification. (AF 126-128). The CO questioned the bona fide nature of the job opportunity and requested clarification as to the job title. (AF 127). Employer filed a rebuttal on May 13, 2002 and the CO issued a Supplemental Notice of Findings ("SNOF") on May 29, 2002. (AF 67-125). The CO again questioned the bona fide nature of the position, but determined that according to Employer's rebuttal, the position offered was for a hardware engineer, not for an electronics design engineer. As such, the CO raised the issue of the prevailing wage; the CO stated that Employer's wage offer of $66,500 per year was below the prevailing wage of $100,360 for the position of hardware engineer. (AF 68). The CO instructed Employer on how to amend the prevailing wage to comply with 20 C.F.R. § 656.20(c)(2) and stated that Employer needed to rerecruit, using the prevailing wage.

Employer filed its supplementary rebuttal on July 1, 2002, arguing that because the CO agreed that the appropriate job title was that of hardware engineer, Employer's recruitment effort was sufficient. (AF 59-66). Employer did not agree with the CO's determination that rerecruitment at the appropriate prevailing wage was required. (AF 60).

A Second SNOF ("SSNOF") was issued on October 3, 2002. (AF 51-53). The CO noted that Employer had adequately rebutted the finding relating to the bona fide job opening. However, the CO stated that Job Service wage determination made on July 22,

1999 was inaccurate because it requested the prevailing wage for an electronics design engineer with a Bachelor's degree, not a Masters degree, as stated on the ETA 750A. Therefore, the CO found that this wage determination was invalid. (AF 52).

Employer responded by arguing that the prevailing wage was the same, regardless of whether the position required a Bachelor's degree or a Master's degree. Employer stated that the prevailing wage was $66,500 and the harmless error of requesting the wage for a Bachelor's degree position did not affect the actual wage determination. (AF 48). Employer did not believe that the prevailing wage of $100,360 for a hardware engineer was applicable to this position.

On November 5, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 41-42). The CO found that the prevailing wage for the occupation of hardware engineer, requiring a Master's degree plus three years of experience, was $100,360, as indicated in the Department of Labor's Online Wage Library, a copy of which was submitted by Employer. (AF 124). Employer refused to pay this wage and as a result, the CO denied certification. (AF 42).

On November 15, 2002, Employer filed a Motion for Reconsideration, arguing that the recruitment was sufficient, that the prevailing wage of $100,360 was incorrect, and that Employer had agreed to readvertise with a rate of pay of $81,420. (AF 38-40). The CO denied reconsideration on December 4, 2002, finding that the offer to readvertise was not accepted because it was at an unacceptably low rate. (AF 37). Employer filed a Request for Review on December 12, 2002 and the matter was docketed in this Office on February 14, 2003. (AF 1-36).

DISCUSSION

In order to effectively test the job market for the availability of U.S. workers for a particular position, as well as to ensure that the wages and working conditions are not adversely affected by the employment of the alien, the employer must offer the prevailing

wage. According to 20 C.F.R. § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under 20 C.F.R. § 656.40, which defines the prevailing wage as the average wage for workers similarly employed in the area of intended employment and allows for a five percent variation from the prevailing wage. If an employer is notified that its wage offer is below the prevailing wage, but fails either to raise the wage to the prevailing wage or to justify the lower wage, certification is properly denied. *General Aerospace Corp.*, 1988-INA-480 (Jan. 11, 1990); *Emil Sztykiel*, 1988-INA-67 (Mar. 1, 1989); *Ashwin L. Shah*, 1988-INA-290 (Nov. 2, 1989).

Employer was notified in multiple NOFs that the offered wage was below the prevailing wage of $100,360. (AF 124). The wage of $100,360 was listed on the Department of Labor's Online Wage Library, for the position of Hardware Engineer, Level 2. Although the CO initially determined that the position should have been advertised as electronics design engineer, Employer sufficiently rebutted and demonstrated that the position was more accurately described as hardware engineer. Therefore, it is the prevailing wage for the hardware engineer position that must be used.

Employer claimed that the page from the Online Wage Library was submitted to prove the position was actually that of hardware engineer, not electronics design engineer. Employer convinced the CO of this; the CO found that Employer had effectively rebutted the finding that the job should have been classified as electronics design engineer. However, Employer then attempted to argue that the CO should not use the prevailing wage from this same page. The CO found no merit to Employer's argument that the prevailing wage from the Online Wage Library was inapplicable because Employer submitted it only to demonstrate the difference between the two classifications of engineers.

Employer originally submitted a July 22, 1999 wage determination from EDD, which found that the prevailing wage for an electronics design engineer with a Bachelor's degree and three years of experience was $66,550. (AF 189). Employer argued that this

wage determination was valid because although the position was described as electronics design engineer, the title of hardware engineer fits under the same classification. However, as noted by the CO, this wage determination was for a position requiring only a Bachelor's degree, not a Master's degree, as required by Employer for the position at issue. (AF 189). Therefore, this wage determination is for a position that is different than the one advertised.

Employer argued that the error in education requirements on the wage determination was inconsequential, as he stated that regardless of the level of education required (Bachelor's degree or Master's degree), the wage would have been the same. The CO found no merit in this argument and stated that the wage determination was invalid.

Employer further argued that the recruitment with an offered wage of $66,550 was valid because the recruitment was performed with the correct job title, hardware engineer. Employer claimed that it was not necessary to recruit with the current prevailing wage, as recruitment had already been done. However, as the CO determined, the recruitment was performed with a wage offer that was significantly below the prevailing wage. The CO found that based on this reason, the recruitment was insufficient and therefore, requested that Employer amend the prevailing wage and rerecruit. Employer failed to do so, instead asserting that the original recruitment was not deficient and the prevailing wage determination was not faulty.

With its Motion for Reconsideration, Employer submitted a wage determination, dated October 8, 2002, which indicated the prevailing wage for the position at issue was $85,696. (AF 46). Employer then agreed to amend the rate of pay to $81,420 and to readvertise at this rate. (AF 44-47). When an offer to readvertise at the prevailing wage is made subsequent to the issuance of the FD, this offer is untimely. *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (*en banc*). Employer has repeatedly stated that the prevailing wage was $66,550, even though Employer itself submitted evidence showing the prevailing wage to be much higher. Employer cannot belatedly agree to

amend the wage offered after he contested the wage determination and did not prevail. Therefore, Employer's offer to amend is untimely and certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.